

APPEAL NO. 022426
FILED NOVEMBER 4, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 3, 2002. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) date of injury was _____; that he did not timely report his injury and did not have good cause for failure to do so; and that, because the claimant had not timely reported his injury, the injury was not compensable and the claimant, by definition, did not have disability. The claimant appealed the determinations on the issues on sufficiency grounds and also argued that the Texas Supreme Court decision in Downs¹ resulted in the respondent (carrier) having waived its right to contest compensability. The carrier responded, urging that the decision of the hearing officer be affirmed and that the claimant could not argue Downs for the first time on appeal.

DECISION

Affirmed.

We first note that the case file contains a lengthy letter from the claimant's treating doctor. The letter is dated September 21, 2002, subsequent to the date of the CCH, and was received by the Texas Workers' Compensation Commission's (Commission) Chief Clerk of Proceedings on September 25, 2002. The letter purports to be an appeal on behalf of the claimant, but was not attached to the appeal filed by the claimant's attorney, and there is no indication that the claimant is even aware that the treating doctor wrote the letter, or otherwise authorized the release of the medical information contained in the letter. The treating doctor did not sign the letter "on behalf of the claimant," nor was she a party at the CCH, and there is no evidence, nor any allegation, that she is a subclaimant pursuant to Section 409.009. We will disregard the letter from the treating doctor.

The hearing officer did not err in determining that the claimant's date of injury was _____. On all three Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) in evidence, the claimant filled in the date of injury as _____. The hearing officer noted that the treating doctor's records indicate that date as the one on which the claimant knew or should have known that the claimant's injury may be related to his employment. See, Section 408.007. We affirm the date-of-injury determination.

It is undisputed that the carrier received written notice of the claimed repetitive trauma injury to the claimant's upper back, shoulders, and neck on September 20,

1

Continental Casualty Co. v. Downs, 81 S.W.3d 803 (Tex. 2002)

2001, and that it neither initiated payment of benefits or denied the claim until November 8, 2001, which time is more than seven days from the date of notice. The claimant asserts that the carrier has waived its right to contest compensability of the claimed repetitive trauma injury based upon the recent Texas Supreme Court decision in Downs, *supra*. The carrier argues the claimant cannot raise a Downs argument for the first time on appeal.

The issues agreed upon at the CCH were the correct date of injury, whether claimant timely reported such injury to the employer and, if she did not, was there good cause for failing to do so, and disability. Carrier waiver was not an issue. Section 410.151(b) provides, in part, that an issue that was not raised at a benefit review conference (BRC) may not be considered unless (1) the parties consent or (2) if the issue was not raised, the Commission determines that good cause existed for not raising the issue at the BRC. During the opening statements the hearing officer asked the parties if they were aware that Downs “is final as of today?” Claimant’s attorney asked, “Is that retroactively applied then?” to which the hearing officer answered, “I don’t know.” There was no further mention of Downs, *supra*, or carrier waiver of compensability at the CCH and there was no motion or attempt to add carrier waiver of compensability as an issue. On appeal the claimant requests a remand to determine carrier waiver under Downs conceding no effort was made to add Downs or carrier waiver as an issue. In that Section 409.021, the pay or dispute provision at issue in Downs, was not raised at the BRC, and there was no attempt to raise the issue or have the hearing officer find good cause for not raising the issue, we decline to address it for the first time on appeal. We would further note that it was the hearing officer rather than one of the parties that raised the Downs, *supra*, case at the CCH.

After review of the record before us and the complained-of determination, we have concluded that there is sufficient support for the hearing officer’s decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly the hearing officer's decision and order are affirmed.

The true corporate name of the carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE I
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Margaret L. Turner
Appeals Judge